

REMARKS**Status of the Claims**

Claims 1-34 are pending. Claims 1-9 and 11-29 stand rejected under at least one of 35 U.S.C. § 112, second paragraph and 35 U.S.C. §103. Claim 10 is objected to. Claims 1, 18 and 28 are amended. Claims 30-38 are added. The claim amendments are primarily to place the claims in better form. No new matter is added as a result of the above amendments.

new
added
10
11-29
1-9

Finality of Outstanding Office Action/Entry of Present Amendment

Applicant respectfully submits that the outstanding Office Action was prematurely made final.

A second or subsequent Office Action may be made final except for where the Examiner introduces a new ground of rejection. See MPEP §706.07(a). In the outstanding Office Action, the Examiner presented a new ground of rejection based on the allegation that the Langley reference anticipates the present invention under 35 U.S.C. § 102(b).

An exception to the above practice standard is when the new ground of rejection was necessitated by an Amendment by Applicant. It is this basis that the Examiner states he made the outstanding Office Action final. However,

Applicant respectfully submits that the Amendment should not have been the grounds for the new rejection.

MPEP §706.07 states that “before a final rejection is in order, a clear issued should be developed between the Examiner and Applicant . . . The Applicant who is seeking to define his or her invention in claims that would give him or her the patent protection to which he or she is justly entitled should receive the cooperation of the Examiner to that end, and not be prematurely cut off in the prosecution of his or her application. But the Applicant who dallies in the prosecution of his or her application, resorting to technical or obvious subterfuges in order to keep the application pending before the Primary Examiner, can no longer find refuge in the rules to ward off a final rejection.”

Applicants respectfully submit that the above amendments were an attempt to address the issues raised by the Examiner and to better protect Applicant’s invention. Applicant further submits that the new claims were submitted in an effort to cooperate with the Examiner and his urging through multiple 35 U.S.C. § 112, second paragraph rejections in the previous Office Action that Applicant better define the invention, rather than the “dallying” described in MPEP § 706.07(a), quoted above. Further, the claims added in the previous amendment were all dependent claims that were not known to affect the Examiner’s search or raise issues not yet considered by the Examiner. In that regard, the amended claims could be seen as reasonably expected by the

Examiner. Just as importantly, the claim amendments should not have affected the applicability of the use of the Langley patent as the basis of a new rejection. Furthermore, the Examiner has not clarified why the amendment necessitated the new grounds of rejection or why the claims as amended require the applicability of the Langley reference as a 35 U.S.C. 102 rejection. Based on the above statements from the MPEP, the Examiner should not use any amendment as a “green-light” to make a rejection final.

Therefore, the Examiner is respectfully requested to remove the finality of the previous rejection.

Alternatively, Applicant requests that the above claim amendments be entered and examined. As stated above, the above claims are believed to better define the application, and do not raise issues that would require further consideration and/or searching.

Issues under 35 U.S.C. § 112, Second Paragraph

Claims 1-9, 11 and 12 are rejected under 35 U.S.C. § 112, second paragraph as allegedly being indefinite. This rejection is respectfully traversed. Reconsideration and withdrawal thereof are requested. However, in view of the above amendments, this rejection is moot. The above claims were amended for clarification purposes, and it is believed that the amendment address the Examiner's concerns regarding the claim language.

Regarding claims 1-9 and the Examiner's concern about the molecular weight, the Examiner's attention is respectfully directed to the claims, where "weight average molecular weight" is used.

Support

Regarding claims 18-28, the term "essentially" is deleted.

In view of the above, Applicant respectfully requests that this rejection be withdrawn.

Issues under 35 U.S.C. §§ 102, 103

Claim 1-9, and 11-29 are rejected under 35 U.S.C. § 102 as allegedly be anticipated by, or, in the alternative, under 35 U.S.C. § 103 as allegedly being obvious over Langley, US Patent Number 4,833,010. This rejection is respectfully traversed. Reconsideration and withdrawal thereof are requested.

In the previous response, the contents of which are incorporated herein by reference, Applicant stated that Langley discloses a multi-layer chemical barrier fabric that may have a surface film of linear low-density polyethylene. Langley fails to disclose a chemical barrier comprising a thermoplastic polyolefin (TPO) of the present invention.

More specifically, Langley discloses a composite of multi-layered films laminated to a polypropylene (PP) nonwoven substrate, the multi-layered films each having an exposed surface of heat sealable polyethylene (PE). Langley identifies his objective in the body of the patent as disclosing a highly chemical

resistant composite as defined by permeation testing against 15 chemicals. See col. 3 and 4 of Langley and page 8 of the Specification.

On the other hand, the present invention teaches a method of enhancing the durability of a composite (similar to the composite of the Langley reference, for instance) by the application of the thermoplastic polyolefin resin coating of the present invention.

Turning now to the specific issues raised in the Office Action, the Examiner's attention is respectfully directed to the following points forming the basis of the rejection set forth in the Office Action:

Page 4 of the Office Action states that "...it appears as though Langley uses a chemical barrier composite substantially identical as the presently claimed chemical barrier composite..." Additionally, the Office Action states that "it is believed by the examiner that the chemical barrier layers of Langley inherently have a molecular weight distribution range within the presently claimed ranges."

When setting forth a rejection under 35 U.S.C. 102, the "identical invention must be shown in as complete detail as is contained in the... claim." Richardson v. Suzuki Motor Co., 9 U.S.P.Q.2d 1913, 1920 (Fed. Cir. 1989). It is unclear what the Examiner intends by the phrase "substantially identical." Applicant assumes that "substantially identical" means that something has to be modified before the composite is "identical." If such is the case, the anticipation rejection is an improper one.

Additionally, when setting forth a rejection based on inherency (as is the present case), the burden is squarely on the Examiner to provide a rationale or reasoning explaining his position. Just because a certain result *may occur* or *may be present* is not sufficient to establish the inherency of that result or characteristic. See In re Rijckaert, 9 U.S.P.Q.2d 1955, 1957 (Fed. Cir. 1993).

Furthermore, the Board of Appeals has stated that "[i]n relying upon the theory of inherency, the examiner must provide a basis of fact and/or thecnical reasoning to reasonably support the determination that the allegedly inherent characteristic necessarily flows from the teachings of the prior art." Ex parte Levy, 17 U.S.P.Q.2d 1461, 1464 (Bd. Pat. App. & Inter. 1990).

In the outstanding Office Action, the Examiner did not provide such support. The statement in the Office Action is only a subjective opinion that is not supported by evidence such as a journal article or the like as required by the Federal Circuit and the Board of Appeals. In that regard, the instant rejection is an improper one.

There also appears to be some confusion as to the polymers involved with the reference and instant claims. The Langley reference discloses heat sealable polyethylene surfaces. TPO, on the other hand, is not a polyethylene polymer, but rather an alloy of polypropylene (PP) and ethylene propylene rubber (EPR), of which the PP enhances heat sealability and increases physical properties, and the EPR induces flexibility. TPO is produced according to the catalloy process, which enables one to modify the polypropylene backbone, tightly

control molecular weight, and molecular weight distribution. As such, the Langley reference does not anticipate, through inherency or otherwise, the claimed invention.

Regarding the rejection under 35 U.S.C. § 103, the Office Action states that "...the presently claimed molecular weight distribution would obviously have been provided by the composite of Langley." As stated in the previous response, the contents of which are incorporated herein by reference, the burden is on the Examiner to provide some suggestion of the desirability of doing what the inventor has done. See MPEP § 2142. The Examiner has summarily concluded that the asserted substitutions or modifications are obvious without providing any objective reasons to support the Examiner's subjective conclusion. Factually supporting a conclusion of obviousness with objective evidence is an absolute requirement. See In re Fine, 5 U.S.P.Q. 2d 1596 (Fed. Cir. 1988), and Ex parte Levengood, 28 U.S.P.Q. 2d 1300 (Bd. Pat. App. & Inter. 1993), discussed in the previous Amendment.

Furthermore, the Supreme Court has stated that patent examiner carry the responsibility of making sure that the standard of patentability is applied in each and every case. See Graham v. John Deere, 383 U.S. 1 (1966). The Supreme Court further set forth several factors since known as the Graham factors, which must be considered when considering obviousness. None of the factors were considered in the conclusion of obviousness on page 5 of the Office Action. Thus, the present rejection is improper and should be withdrawn.

In addition to the comments regarding the obviousness rejection discussed above, the TPO technology came into full operation after the filing date of the Langley patent application. Thus, the Langley reference on its own does not provide any motivation to one of ordinary skill in the art to modify it to arrive at the present invention.

The Examiner mentioned Table 3 on page 6 of the Specification. This was discussed in the previous Office Action (please see pages 9-10) to give the Examiner a point of comparison for a composite of the present invention and a composite similar to those disclosed in the Langley reference. The specification on page 4 states that the composites of the present invention have increased puncture resistance. When compared composites encompassed by the reference cited by the Examiner, the composites of the present invention demonstrate a 92% increase in puncture resistance. Therefore, assuming the Examiner has properly set forth a proper rejection under 35 U.S.C. § 103, the results of these tests would provide the superior and unexpected results necessary to overcome such a rejection.

It is not understood why the Examiner summarily concludes that the results of the comparative tests would be expected for one of ordinary skill in the art. See page 5 of the Office Action. The addition of a thin layer of a very "soft" polymer such as polyurethane would not significantly increase puncture resistance from the standpoint of one of ordinary skill in the art, especially at the levels achieved for the present invention. Application of alternative resins to

the outer surface could also have negative affects such as inducing objectionable stiffness, and reduce or eliminate the heat seal characteristics of the base, non-coated material. With the present invention, durability is enhances (i.e., cut, puncture, abrasion resistance), heat sealability is retained, and flexibility is retained (see Table 4 on page 16 of the Specification). One of ordinary skill in the art would expect a slight increase in puncture and abrasion resistance with the addition of a 5 mil or 10 mil polyethylene film to the composite of the Langley patent, but also at the expense of flexibility.

In summary, the Examiner has not provided an objective reason to modify the reference, and the Examiner has not carried his burden in establishing a prima facie case of obviousness. Additionally, the results of the comparative tests in Specification are clearly greater than expected results with respect to the subjective conclusion of obviousness in the outstanding Office Action. As such, Applicant respectfully requests that this rejection be withdrawn.

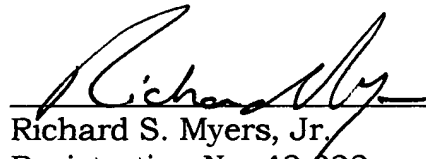
From the foregoing, further and favorable reconsideration in the form of a Notice of Allowance is requested and such action is earnestly solicited.

If the Examiner has any questions concerning this Amendment or the Application in general, he is respectfully urged to contact Richard S. Myers, Jr. (Reg. No. 42,022) at the number listed below.

The Commissioner is authorized to charge the required fee for the one additional independent claim and the 9 additional total claims to Deposit Account No. 23-0035.

The Commissioner is authorized to charge any deficiency or credit any overpayment in connection with this Amendment to Deposit Account No. 23-0035.

Respectfully submitted,



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Version With Markings to Show Claim Changes Made

Claim 1. (Twice Amended) A composite chemical barrier fabric having improved durability comprising:

a multiple layer, chemical barrier material having a first side and a second side; and

a durability barrier layer coated on at least one of said first or second side comprising a thermoplastic polyolefin with a weight average molecular weight distribution range of from about 0.85 to about 0.95, the coated chemical barrier composite achieving at least 25% improvement in puncture resistance and at least 25% improvement in flex-crack resistance of the fabric when compared to a fabric not having said durability barrier layer.

Claim 18. (Twice Amended) The composite chemical barrier fabric of Claim 13, wherein the [,] multiple layer chemical barrier material contains at least one stratum that comprises a material selected from the group consisting [essentially] of polyvinylidene chloride, ethylene vinyl acetate, ethylene vinyl alcohol, nylon, polyvinyl alcohol, polyester, polytetraflouroethylene, fluorinated ethylene propylene, polyvinylidene chloride copolymer, acrylic, acrylonitrile copolymer, ionomers, ethylene/methacrylate acid copolymer, polybutylene, metalized polyester, polypropylene, oriented polypropylene, and polyamide.

Claim 28. (Amended) The composite chemical barrier fabric of Claim 13, wherein the multiple layer chemical barrier material contains at least one stratum that comprises a material selected from the group consisting [essentially] of polyolefin, polyolefin copolymers, ionomers and ionomer copolymers.